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September 5, 1997

## HAND DELIVER

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Omnipoint Corporation  
WT Docket No. 97-82  
Ex Parte Presentation

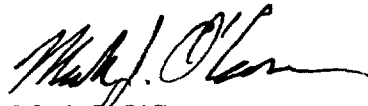
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Dear Mr. Caton:

In conformity with the Commission's rules, enclosed please find two copies of a written *ex parte* presentation for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor  
Counsel for Omnipoint Corporation

/mjo  
Enclosures

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September 5, 1997

## HAND DELIVERY

Mr. Jon Garcia  
Director of Strategic Analysis  
Office of Plans and Policy  
Federal Communications Commission  
1919 M Street, N.W., Room 838  
Washington, D.C. 20054

Re: Omnipoint Corporation  
Ex Parte Presentation: WT Dkt. No. 97-82

Dear Mr. Garcia:

We submit this letter on behalf of Omnipoint Corporation to clarify its position to the C Block PCS Task Force. As you know, Omnipoint is the fourth largest C Block debt holder but was not among the C Block licensees that asked for broad restructuring of auction debt. Rather, Omnipoint suggested that the Commission react as any reasonable commercial lender would in such a situation: take temporary relief measures to offset a temporary (and now vastly improved) market condition. The PCS Stock Index is now higher than it was during the C Block re-auction, and the High-Yield Debt Index of wireless companies is higher now than it was during either the C Block auction or re-auction. Fears that a significant portion of the 132 companies with Entrepreneur Band licenses will file for bankruptcy are wholly speculative; only 15% of those companies have sought any relief. Over 100 Entrepreneur companies have not asked for any relief. Of those that have sought relief, the majority have license debt that is less than \$10/pop on an NPV basis (many of those licensees have auction debt below \$5/pop NPV). Thus, Omnipoint maintains that the Commission and the public are still best served by its original proposals. Temporary relief from auction debt burdens for all licensees would provide a window to pursue public and private transactions, and further reduce the potential for bankruptcies.

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The single most important action that the Commission can take at this point is to treat all Entrepreneur bidders fairly, not just those seeking relief. Unfortunately, most of the current proposals receiving attention are generated from those C Block companies that seek fundamental post-auction changes to the C Block rules. Omnipoint now understands that the Task Force is considering seriously some form of a debt forgiveness/amnesty<sup>1</sup> program for C Block licenses (including expedited reauction and "disaggregation"<sup>2</sup>-reauction). As you know, there are many, many different variations of amnesty ideas, and each one raises a number of very serious concerns. However, if the Commission were to adopt *any* amnesty "solution," legal and policy considerations would require the Commission to also adopt rules to ensure that C Block licensees with operating businesses are not disadvantaged financially and that the public is not deprived of the service that such licensees are providing.

C Block licensees like Omnipoint -- that have taken the Commission at its word to roll out service to the public as quickly as possible at significant capital investment -- would risk severe financial crises with the adoption of *any* amnesty program unless appropriate remedies are in place. These licensees cannot possibly participate in amnesty because their operating businesses are completely tied to specific C Block licenses.<sup>3</sup>

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<sup>1</sup> In this letter, Omnipoint uses the term "amnesty" to generally describe the proposals for expedited re-auction and for spectrum disaggregation. The commonality of any such proposal is essentially to provide debt forgiveness for participating licensees. Amnesty from the auction debt obligation, whether full or partial through disaggregation, is not contemplated in the Commission's current rules.

<sup>2</sup> "Disaggregation" is, in fact, a misnomer for the proposal to give back a portion of C Block spectrum (10 or 15 MHz) to the FCC for reauction, and, in return, the licensee receives a pro-rata release from the auction debt obligation. By contrast, the Commission's current rules contemplate "disaggregation" as an assignment of C Block spectrum only between two eligible licensees, in which "[b]oth parties will be responsible for paying their proportionate share of the outstanding balance owed to the U.S. Treasury." 47 C.F.R. § 24.714(d)(1). See also Report and Order and Further Notice of Proposed Rulemaking, WT Dkt. No. 96-148, GN Dkt. No. 96-113 (rel. Dec. 20, 1996).

<sup>3</sup> For example, in the 12 months since its C Block licenses were granted in September, 1996, Omnipoint has already made significant progress in building out several of its markets. In the

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Unlike mere bidding entities, operating companies cannot simply "turn in" their licenses, or significant portions of the spectrum, through an amnesty program. Surrender of the license by a company that has obtained build-out financing would cause the licensee to breach its financing arrangements, which would result in protracted litigation, contractual penalties, and damage critical business relationships. In addition, any licensee that has turned on or is actively marketing service cannot simply tell customers to hold tight for some indefinite period with the hope that the operator (or its investors) will perhaps win the license back at a reduced cost.<sup>4</sup>

Operational C Block companies are left with no recourse in any amnesty. In the C Block simultaneous auction, each high bid was made relative to the then alternative license prices in the auction; an amnesty would radically change the entire premise of that simultaneous auction. Since it is widely believed that the resulting re-auction could easily yield prices much lower than the current C Block prices, those licensees that are effectively precluded from participating in the amnesty/re-auction because they have already built out their licenses would be stranded with artificially higher prices.

Because the whole premise of the simultaneous auction is that the license values are interrelated, it would be grossly unfair for C Block operating companies to be the only licensees left with relatively higher prices from the original auction. *In effect, the Commission would have taken the simultaneity out of the initial simultaneous auction, and deprived some licensees the opportunity to protect their legitimate interests.* Investors and lenders would correctly view such a licensee's inability to obtain an effective license debt adjustment as a serious disadvantage. As a result, the licensees that believed the Commission's rules would be enforced have no means to benefit from any amnesty program, and will face significant relative disadvantage in the capital markets.

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Philadelphia, PA and surrounding BTAs, Omnipoint has taken on the financial risk of many tens of millions of dollars in launching commercial service.

4 Even if some licensees took this risk, every other bidder would know that such a licensee is already significantly invested in those markets. Thus, that licensee would enter any re-auction with a severe strategic disadvantage vis-a-vis other auction participants.

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To accommodate this consequence in the context of *any* amnesty program, Omnipoint believes that the Commission should adopt a bright-line test for identifying those licensees who should qualify for debt restructuring based on the amnesty/reauction results. Under any amnesty proposal, such an exception would be required as a matter of law. As the D.C. Circuit explained more than 50 years ago, "valuable rights and investments made in reliance on a license of the Federal Communications Commission should not be destroyed except for the most compelling reasons." Churchill Tabernacle v. FCC, 160 F.2d 244, 247 (D.C. Cir. 1947).<sup>5</sup> In this case, the small business licensees that meet the bright line test in the build-out of their licensed systems have unequivocally relied on the Commission's rules, which do not contemplate amnesty. The Commission's uniform and strict enforcement of those rules have bolstered that reliance.<sup>6</sup> The Commission's precedent also teaches that regulatory changes and uncertainty, as would result from any amnesty program, are contrary to the public interest if they deter licensees from significant infrastructure investment that must be made to bring service to the public.<sup>7</sup> Indeed, in its last effort at crafting changes to the C Block auction rules, the Commission itself recognized the significance of "preserv[ing] existing business relationships formed in reliance on or prior rules."<sup>8</sup> If the reliance interests of prospective short-form C Block *applicants* were entitled to protection, then surely C Block *licensees* that have invested millions of dollars in infrastructure and are operational are far more entitled to relief.

Reasonable reliance interests must be taken into account, particularly for C Block licensees that have effectively built-out operational systems and would have no way to participate in the amnesty program. Justice Scalia's admonition in Bowen v. Georgetown University Hospital controls here: an agency rule amendment "that makes worthless

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<sup>5</sup> See also Jefferson Radio v. FCC, 340 F.2d 781, 784 n. 4 (D.C. Cir. 1964).

<sup>6</sup> See Comments of Cook Inlet Region, Inc., et al., WT Dkt. No. 97-82 (filed June 23, 1997) (citing case after case where FCC has strictly enforced its auction payment rules).

<sup>7</sup> See, e.g., RKO General, Memorandum Opinion and Order, 3 FCC Rcd. 5057, 5060 (1988).

<sup>8</sup> Sixth Report and Order, PP Dkt. No. 93-253, 11 FCC Rcd. 136, ¶ 16 (1995), *aff'd*, Omnipoint Corp. v. FCC, 78 F.3d 620, 633 (D.C. Cir. 1996) (in changing the C Block rules, "the Commission properly weighed the reliance interests of affected parties . . .").

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substantial past investment incurred in reliance upon the prior rule . . . may for that reason be 'arbitrary' or 'capricious,' . . . and thus invalid."<sup>9</sup>

Policy considerations also weigh heavily in favor of relief for such licensees. It is those licensees who stand to fulfill the Commission's policy mandate for "the development and rapid deployment of" PCS. 47 U.S.C. § 309(j)(3)(A).<sup>10</sup> Otherwise, the amnesty "solution" amounts to nothing more than a regulatory preference for some licensees (those that have invested little to provide service and now plead for debt relief) to the disadvantage of other licensees (those like Omnipoint that have taken on the challenges of bringing PCS service to the public as quickly as possible). Remarkably, such an amnesty program would turn the Commission's asserted objectives for C Block PCS -- competition and small business participation in commercial wireless service -- on their heads. To the extent that the Commission fashions relief from the C Block auction debt (amnesty, amnesty with disaggregation, etc.), it must reconcile the negative consequences that such relief would entail.

In the context of fundamental C Block rule changes, Omnipoint believes that debt restructuring of licensees that have met a bright-line test of operational construction is reasonable. As stated in its comments and replies, Omnipoint did not advocate general permanent debt restructuring as appropriate at this time. However, in the context of the radical industry changes, such as brought about by any C Block reauction, debt restructuring for licensees that have already built-out and that meet a "bright-line" test is virtually required because it merely offsets a significant change in the Commission's auction approach.<sup>11</sup>

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<sup>9</sup> 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (citing 5 U.S.C. § 706). See also National Ass'n of Independent Television Producers & Distributors v. FCC, 502 F.2d 249, 255 (2d Cir. 1974).

<sup>10</sup> We also note that Chairman Hundt has indicated that the Commission's objective in this proceeding is to best ensure rapid deployment of competitive PCS systems. See, e.g., Speech of Hon. Reed Hundt to the U.S. Hispanic Chamber of Commerce (July 17, 1997) (FCC should be "guided by our commitment to competition and increasing service to all Americans.").

<sup>11</sup> In that respect, the Commission's actions would be analogous to its imposition of charges on PCS pioneers. Nationwide Wireless Network Corp., Memorandum Opinion and Order, 9 FCC

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As an example of the type of post reauction debt restructuring that would be appropriate to achieve the effect of a simultaneous auction, the Commission should reset the amounts owed by those that meet the bright line test based on the new prices resulting from the reauction. In essence, the restructuring would ensure that operating companies who played by the rules would not be disadvantaged relative to the new reauction prices.

The use of the bright-line build-out test establishes an appropriate method for the Commission to implement a remedial alternative for licensees otherwise harmed by the amnesty. It captures the intended group of licensees that have achieved operational build-out since the issuance of their licenses, and it provides adequate relief from the consequences of amnesty for those that cannot, as a practical matter, turn in their licenses. Further, the Commission should find it relatively easy to administer; the licensee would be required to make more than simply a "bare" certification of compliance, but would be required to make the *same* essential showing as for the five-year system construction requirement.<sup>12</sup>

Finally, and equally important, a licensee that meets the "bright-line" test for a "core" BTA<sup>13</sup> should also be able to retain any secondary licenses it may already hold in the same MTA, because those licenses are a logical part of the licensee's build-out strategy for the larger market. Conversely, it makes little sense to force a single operator to separate the core licenses from the satellite licenses in a given MTA if that operator has

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Rcd. 3635, 3639-41 (1994), *aff'd*, Mobile Communications Corp. of America v. FCC, 77 F.3d 1399 (D.C. Cir. 1996).

<sup>12</sup> 47 C.F.R. § 24.203(c) (compliance with the five-year construction requirement must be demonstrated with "maps and other supporting documents").

<sup>13</sup> MTA designations themselves define the core BTA markets for each MTA. For example, MTA # 48 is designated as "Tulsa" because Tulsa, OK is the "core" city. On a BTA level, the Tulsa BTA (B448) is the core around which secondary BTA's are grouped within that single MTA. In the case of hyphenated MTAs, both designated BTAs are appropriated considered the core.

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already substantially built-out the core.<sup>14</sup> Unlike the A/B Block MTA licensees, the C Block bidders had the grueling task over six months of bidding to assemble surrounding BTAs around the core BTA. To now force a separation of the secondary BTAs because of an unanticipated post-auction amnesty, even though the licensee built out the core license in record time, seems unreasonable and unfair.

We appreciate your efforts, and those of the entire Task Force, over the past few weeks to grapple with the C Block issues. These issues are obviously significant for Omnipoint. Please feel free to contact us if you wish to discuss this matter further. In accordance with the Commission's ex parte rules, two copies of this letter will be submitted this day to the Secretary's Office for inclusion in the above-referenced docket.

Sincerely,



Mark J. Tauber  
Mark J. O'Connor  
Counsel for Omnipoint Corporation

cc: Chairman Reed Hundt  
Commissioner James Quello  
Commissioner Susan Ness  
Commissioner Rachelle Chong  
Blair Levin  
Jackie Chorney  
Rudolfo Baca  
David Siddall  
Suzanne Toller  
Jane Mago

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<sup>14</sup> In terms of promoting rapid service to the public in a given market, the satellite licenses are dependent on the licensee that has already built out the core market, and the technology chosen by that licensee.



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